

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

UNITED STATES OF AMERICA

vs.

PETER C. D'AMELIO

:
: **CRIMINAL ACTION**
: **NO. 98-562-01**
:
: **(CIVIL ACTION NO. 01-5412)**
:

ORDER AND MEMORANDUM

ORDER

AND NOW, this 23rd day of May, 2002, upon consideration of the Motion of Defendant, Peter C. D'Amelio, to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody Under 28 U.S.C. § 2255 (Document No. 160, filed December 5, 2001), the Memorandum in Support of Motion Under 28 U.S.C. § 2255,¹ and the Government's Response to Defendant's 28 U.S.C. § 2255 Motion, for the reasons stated in the following Memorandum, **IT IS ORDERED** that the Motion of Defendant, Peter C. D'Amelio, to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody Under 28 U.S.C. § 2255 is **DENIED WITHOUT AN EVIDENTIARY HEARING**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue on the ground that defendant has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

MEMORANDUM

Presently before the Court is defendant, Peter C. D'Amelio's, Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody Under 28 U.S.C. § 2255 (Document No. 160,

¹The Memorandum was filed on October 25, 2001, in support of defendant's first filed Motion under 28 U.S.C. § 2255. That first filed Motion was dismissed without prejudice because it was not filed on the appropriate form in accordance with this Court's Local Civil Rules applicable to habeas corpus cases.

filed December 5, 2001). The Motion is based on defendant's argument that, after he pled guilty, his co-defendant, Frank DeSumma, wrote a letter to the Government that exonerated him and that his attorney was thereafter ineffective for failing to move to withdraw the guilty plea. No such letter has been produced.

The Court finds that DeSumma did not write a letter to the Government (or to the Court) that exonerated D'Amelio, and that there is no basis for withdrawal of D'Amelio's guilty plea. Accordingly, defendant's Motion will be denied.

I. BACKGROUND

On March 23, 1999, defendant D'Amelio pled guilty to one count of conspiracy to collect extensions of credit through extortionate means in violation of 18 U.S.C. § 894(a)(1), two counts of attempted collection of extensions of credit through extortionate means in violation of 18 U.S.C. § 894(a)(1), and one count of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c).

The trial of defendant D'Amelio's co-defendant, Frank DeSumma, began at the end of March, 1999. D'Amelio testified as a Government witness during the DeSumma trial, reiterating his own guilt of the crimes to which he had entered his guilty pleas, and implicating DeSumma in the felonious conduct of which he, DeSumma, and a third defendant, George Delia, were a part. DeSumma was convicted on all counts.

DeSumma was sentenced on December 18, 2000. D'Amelio was sentenced on December 19, 2000. At this sentencing, D'Amelio reiterated his guilt, apologized for his criminal conduct, and argued for a three-level reduction in offense level for acceptance of responsibility, which he was granted. The pre-departure guideline range for D'Amelio was 97-to-106 months.

Because of D'Amelio's substantial assistance, the Government filed a motion under § 5K1.1 of the Guidelines, seeking a downward departure. The Court granted the Government's Motion under § 5K1.1 and sentenced D'Amelio, inter alia, to concurrent terms of imprisonment of 53 months on the counts to which he pled guilty. D'Amelio did not appeal. The instant Motion under 28 U.S.C. § 2255 was filed on December 5, 2001.

II. DISCUSSION

D'Amelio's Motion is founded upon his belief that his co-defendant DeSumma wrote a letter to the Government in connection with his sentencing that exonerated D'Amelio: "Mr. D'Amelio became aware that DeSumma wrote a letter to the Government during his sentencing; to this day he is still in the evidentiary dark over what exactly Mr. DeSumma said in this letter. But he knows that the statement was exculpatory." Mem. in Supp. Of Mot. Under 28 U.S.C. § 2255 at 2. D'Amelio conceded that he has never seen or received a copy of this alleged letter, but he expresses his belief that it exists based upon "grapevine reports she has received." Id. at 5n.2.

The Government reported, after thoroughly checking its files, that it never received any such letter from DeSumma. See Aff. of Asst. U.S. Attorney David E. Fritchey, appended to Gov.'s Response to Def.'s 28 U.S.C. § 2255 Mot. Moreover, the Court checked its file to determine whether DeSumma ever wrote such a letter to the Court, and found no letter.

D'Amelio further claims in support of his Motion that his guilty plea was not knowingly and voluntarily obtained, and that his attorney was constitutionally ineffective for failure to investigate and to consult with him on the advisability of withdrawing his guilty plea. This argument appears to be based, at least in part, on the belief that DeSumma wrote the letter as alleged.

A defendant is permitted to withdraw a guilty plea only if he has obtained permission of the

Court; such motions are granted only upon a defendant's showing of a "fair and just" reason to withdraw the guilty plea. United States v. Hyde, 520 U.S. 670, 673-74 (1997). A defendant is not entitled to disown his admission under oath in open court that he committed the acts charged in an indictment simply because it later develops that the Government might have had a weaker case than he had thought. Brady v. United States, 397 U.S. 742, 757 (1970).

D'Amelio appears to be saying in his Motion paper that he is innocent of the crime to which he pled guilty. However, a defendant's mere assertion of innocence is not a sufficient ground for withdrawal of a guilty plea. See Government of Virgin Islands v. Berry, 631 F.2d 214, 220 (3d Cir. 1980). A defendant's assertion of innocence must be credible to warrant the vacating of a validly entered guilty plea. See United States v. Smith, 818 F.Supp. 123, 126 (W.D. Pa.), aff'd, 14 F.3d 50 (3d Cir. 1993), cert. denied sub nom. 510 U.S. 1184 (1994); see also United States v. Lewis, No. Crim. 00-66-2, 2002 WL 572341, at *1 (E.D. Pa. April 16, 2002).

The Court conducted an extensive and searching guilty plea colloquy and found there was a factual basis for defendant's plea of guilty. Defendant admitted the facts upon which the Government's case was based including all essential elements of the crimes charged, and, more generally, admitted his guilt of the crimes charged. Then, a short time later, he testified against this co-defendant, DeSumma, and again admitted his guilt. On that record, there is absolutely no basis for allowing defendant to withdraw his guilty plea. Likewise, there is no basis for a conclusion that his attorney was not ineffective for failing to investigate and to consult with his client on the advisability of withdrawing the guilty plea.

As a final matter, the Court concludes that there is no need for an evidentiary hearing. As to the letter, given D'Amelio's inability to produce it and the government's sworn statement that it

received no letter, there is nothing to be accomplished at a hearing. To the extent that D'Amelio claims his innocence, his assertions are legally insufficient to allow withdrawal of his guilty plea, and D'Amelio has not referenced any evidence to support his claims.

III. CONCLUSION

For the foregoing reasons, the Court denies defendant, Peter C. D'Amelio's, Motion to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody Under 28 U.S.C. § 2255.

BY THE COURT:

JANE DUBOIS, J.